Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-120

UNITED STATES OF AMERICA,
Petitioner,
v.
MARTIN LINEN SUPPLY COMPANY and
TEXAS SANITARY TOWEL SUPPLY CORPORATION,
Respondents.

BRIEF OF RESPONDENTS REQUESTING DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

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Respondents request that this Court deny the United States' Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

I. JURISDICTION

Petitioner has not demonstrated a conflict of decisions among different Courts of Appeals or an important unanswered question of federal law as required by Rule 19, 1(b), Supreme Court Rule, Part V, "Jurisdiction on Writ of Certiorari".

II. QUESTION PRESENTED

The Question Presented, as stated in the Petition, misstates the question actually presented since it omits the fact that the Motions were filed and the Judgments of Acquittal were entered pursuant to Rule 29(c), Federal Rules of Criminal Procedure. The Question Presented, properly stated, is:

> "Does the Double Jeopardy Clause preclude an appeal of an acquittal entered after a mistrial pursuant to Rule 29(c), Federal Rules of Criminal Procedure?"

III. STATEMENT OF THE CASE

Petitioner's Statement set forth on pages 3 through 7 of the Petition is essentially correct. Respondents would expand that statement, however, to point out that, while Respondents called only one witness, Petitioner's own witnesses testified in Respondents' favor. Before making the statements quoted by Petitioner (Petitioner's Brief for Certiorari at p. 5), the Trial Court stated:

> "I'll be frank with you, gentlemen. I almost instructed a verdict for all Defendants in this case. I almost granted a judgment for an instructed verdict. . . . I have seen some contempt cases, but this is without a doubt the weakest I have ever seen." (J.A. 673a)

Petitioner continues to ignore the fact that Respondents' Motions for Acquittal were timely made pursuant to Rule 29(c), Federal Rules of Criminal Procedure. The Trial Court reviewed the evidence and entered the Judgments of Acquittal pursuant to Rule 29(c).

IV. REASONS FOR DENIAL

This Court should deny certiorari because (1) the Double Jeopardy Clause forbids a review of the Trial Court's Judgments of Acquittal and (2) there are no conflicting applicable decisions from either this Court or another Circuit Court of Appeals.

A. Double Jeopardy Bars Appeal

Government's Petition seeks to erode the Double Jeopardy Clause and to destroy the significance of the specific provisions of Rule 29(c).

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. . . ." This Court has stated that "[t]he protection is not . . . against the peril of second punishment, but against being again tried for the same offense". *Kepner* v. *United States,* 195 U.S. 100, 130 (1904); *Ball* v. *United States,* 163 U.S. 662 (1896). Having initially failed here, the Government now seeks to try Respondents again for the same offense.

Jeopardy attached as to Respondents when the jury was empanelled and sworn. *Downum* v. *United States,* 372 U.S. 734 (1963). The Trial Court heard all of the Government's evidence, and, after the jury had become hung and was discharged, it entered Judgments of

Acquittal pursuant to Rule 29(c). The Government correctly contends that, if the Trial Court had *not* entered Judgments of Acquittal, a second trial would be permissible. It ignores, however, the very essence of this case—the Trial Court *did* enter Judgments of Acquittal based on the evidence of the trial. A new trial's availability after a mistrial is immaterial. The issue here is the appealability of Judgments of Acquittal entered pursuant to Rule 29(c).

The Government relates, at length, the fact that the Double Jeopardy Clause allows review in two distinct cases—(1) a pre-trial dismissal and (2) a dismissal setting aside a jury verdict of guilty. (Petitioner's Brief for Certiorari at pp. 7-11; Petitioner's Brief for Certiorari in *United States* v. *Sanford* at pp. 10-13). Again, the Government ignores the essence of this case. The instant Judgments of Acquittal were not pre-trial dismissals, and there is no jury verdict of guilty.

This Court established the appealability of a pre-trial dismissal in *Serfass* v. *United States,* 420 U.S. 377 (1975). Chief Justice Burger, writing for the Court, observed that pre-trial dismissals are a review of an indictment's sufficiency in legal terms and *are not* based on evidence adduced at trial. In addition, jeopardy had not attached at the pre-trial stage. Without having been placed in jeopardy, a defendant could not claim the protection of the Double Jeopardy Clause. In this case, Respondents were in jeopardy the moment the jury was sworn, and the Trial Court's action *was* based on evidence adduced at trial.

United States v. *Wilson,* 420 U.S. 332 (1975), established the appealability of a dismissal after a jury

verdict of guilty. The *Wilson* rationale was that a reversal of the *Wilson* dismissal would reinstate the guilty verdict without a second trial. Therefore, Wilson would not "again be tried for the same offense". If Respondents' Judgments of Acquittal were reversed, a second trial would be mandatory. Respondents would be twice put in jeopardy for the same offense. Neither the *Serfass* nor the *Wilson* holding is applicable to the instant case.

Despite the Government's efforts to ignore the attachment of jeopardy and the Trial Court's review of the evidence, the instant case involves Judgments of Acquittal based on factual determinations. Rule 29 gives the Trial Court power to grant Motions for Acquittal after either side has closed, while the jury deliberates or after the jury has returned with either a guilty verdict, or without having returned a verdict. This Court has established that a Trial Court's Judgment of Acquittal pursuant to Rule 29 is final unless there is a jury verdict of guilty. *Fong Foo* v. *United States,* 369 U.S. 141 (1962). In *Fong,* the Trial Court directed a verdict of acquittal during the presentation of the evidence. This Court held that " . . . the verdict of acquittal was final, and could not be reviewed . . . without putting (the petitioners) twice in jeopardy, and thereby violating the Constitution". 369 U.S. at 143.

In *United States* v. *Jenkins,* 420 U.S. 358 (1975), this Court denied the appealability of an acquittal entered by a Trial Court after a bench trial. Writing for the Court, Mr. Justice Rehnquist stressed:

> "In those cases, where the defendants had not been adjudged guilty, the Government's appeal

> was not permitted since further proceedings, usually in the form of a full retrial, would have followed."

420 U.S. at 369.

The Trial Court could have entered Judgments of Acquittal at the close of the Government's evidence, while the jury deliberated, or, as it did, after the jury was unable to reach a verdict. Judgments of Acquittal at each of these moments would have the same effect under Rule 29. The Fifth Circuit agreed when it observed:

> "The Government argues that its right to insist on a jury trial would be abridged if this Court views the proceedings below as if they were the result of a bench trial. This assertion ignores, however, the fact that whether the trial is to a jury or to the court, if the evidence is deemed insufficient to support a verdict or finding of guilty the court must grant a directed verdict of acquittal." (Petitioner's Brief for Certiorari at p. 5a)

Since the instant Judgments of Acquittal were based on an evaluation of the evidence presented at trial and a reversal would compel a second trial, the Double Jeopardy Clause bars an appeal of the Trial Court's Judgments of Acquittal.

B. Agreement Among Circuits

The Government contends that the Fifth Circuit's well-reasoned decision in the instant case conflicts with the Ninth Circuit's holding in *United States* v. *Sanford,* No. 73-3016 (9th Cir., filed May 27, 1976), *petition for cert. filed*, No. 75-1867, June, 1976, and the Sixth Circuit's holding in *United States* v. *Wilson,* 534 F.2d 76 (6th Cir. 1976). The Ninth Circuit in *Sanford,* on

weaker facts, held that the Government's appeal was barred by the Double Jeopardy Clause. Since the Fifth Circuit reached the same decision, the two decisions are *not* in conflict.

The Government has attempted in its Petition in *Sanford* and in the instant Petition to merge the two cases. The two cases are not the same. The *Sanford* decision does not involve Rule 29(c). In *Sanford,* the Ninth Circuit extended the Fifth Circuit's holding in the instant case to bar the review of all post-trial Judgments of Acquittal unless there is a jury verdict of guilty.

United States v. *Wilson, supra,* does not conflict with the Fifth Circuit's decision in this case. In *Wilson*, there was no Judgment of Acquittal. *Wilson,* then is simply a determination of whether the Double Jeopardy Clause bars a new trial after a mistrial. As heretofore discussed, that question is immaterial to the instant Judgments of Acquittal.

The Sixth Circuit recently agreed with the Fifth Circuit's *Martin Linen* holding. *United States* v. *Robbins*, 510 F.2d 301 (6th Cir. 1975), *cert. denied,* 96 S.Ct. 772 (1976). In *Robbins*, the Trial Court granted the Defendant's Motion for Judgment of Acquittal after the Government rested. The Sixth Circuit held that double jeopardy barred a review of the Trial Court's decision.

V. CONCLUSION

The instant case involves *post-trial* judgments under Rule 29(c) and a reversal of those judgments would require a *second* trial. This Court has established that the Double Jeopardy Clause bars a review of such a

judgment. In addition, there is no conflict to be resolved by this Court. Therefore, this Court should deny the Government's Petition for Writ of Certiorari.

Respectfully submitted,

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August 23, 1976

VI. CERTIFICATE OF SERVICE

I certify that I served this Brief of Respondents Requesting Denial of the Petition for Writ of Certiorari on:

SOLICITOR GENERAL
Department of Justice
Washington, D. C. 20530

UNITED STATES ATTORNEY
Federal Courthouse
San Antonio, Texas 78205

by depositing three copies addressed to each of them, respectively, in the United States Post Office, San Antonio, Texas, on August 23, 1976, first class postage prepaid, at such addresses.

J. Burleson Smith